IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1849 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SANJAY SITARAM PASWAN

Versus

COMMISSIONER OF POLICE

Appearance:

MR AJAY S JAGIRDAR for Petitioner

Mr S P Dave, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 03/05/2001

ORAL JUDGEMENT

The present petition has been filed by the petitioner above named under Article 226 of the Constitution of India challenging the order of detention dated 30.7.2000 recorded by the Police Commissioner,

Rajkot City, respondent no.1 herein in case No. PCB/BTN/Pasa/75/2000 in exercise of powers conferred under section 3(2) of the Gujarat Prevention of Antisocial Activities Act, 1985 (for short, 'the Act'). on the ground that the petitioner was a dangerous person and his activities were detrimental to the public order and, therefore, he was required to be detained under the above provisions. The petitioner has challenged the said order of his detention on several grounds. One of the contentions is that the detaining authority as stated in para 8 of the grounds of detention that the petitioner was involved in offences and he had applied for releasing him on bail, that the petitioner was in judicial custody and if the petitioner was released on bail, then he would continue the aforesaid anti-social activities detrimental to the public order and, therefore, he was required to be detained. The petitioner contended that the detaining authority was required to consider the less drastic remedy before passing the order of detention. That this has not been done in the present case and, therefore, the detention order suffers from non-application of mind. The petitioner, therefore, prays that the detention order may be quashed and set aside and the petitioner may be set at liberty.

2. On receiving the petition, Rule was issued and Mr S P Dave, learned AGP, appears on behalf of all the respondents and waives service of rule. I have heard the learned Advocates for the parties and have perused the papers.

3. Learned Advocate for the petitioner has drawn my attention to para 8 of the grounds for detention recorded by the detaining authority. It shows that the petitioner was involved in certain offences and the offences have been enumerated in the grounds for detention. The detaining authority has also mentioned that the petitioner had applied for releasing him on bail and on release of bail, the petitioner would continue the aforesaid antisocial activities and, therefore, there was no alternative but to detain him in exercise of powers conferred under section 3(2) of the Act. Therefore, according to the case of the detaining authority, the petitioner was required to be detained and he has been detained under that provision. At this juncture, learned Advocate for the petitioner also argues that the State of Gujarat or the detaining authority could have made appropriate representation before the appropriate court not to release the petitioner on bail showing the grounds for not releasing him on bail. He further argues that even if the petitioner was released on bail, the

detaining authority could have filed application for cancellation of bail. That therefore, there were two lesser drastic remedies available to the detaining authority before passing of the final order of detention. That the detaining authority has not availed of the said less drastic remedy. At the same time, the said remedy has not been properly considered by the said authority and, therefore, the order suffers from non-application of mind. In support of the said argument, learned Advocate for the petitioner relied upon a decision in the case of Subhashchandra J Thakur v. State of Gujarat in Special Civil Application No.1725/2001. The learned Judge of this Court (H K Rathod,J) has observed in the said judgment as under:

> "In the instant case, the detenu is on better footing. He was in judicial custody at the time when the impugned order of detention came to be passed. Therefore, the detaining authority could have considered the remedy of opposing bail application before the Court and if granted, thereafter, there was an option of having resort to section 437 (5) of the Code of Criminal Procedure. However, the aspect of lesser drastic remedy i.e. proceedings under section 437(5) of the Code has also not been considered by the detaining authority. From the bare reading of the grounds of detention communicated to the detenu under section 9(1) of the PASA Act, it does not appear that the detaining authority has taken into consideration that the bail application, if preferred by the petitioner, can be opposed. The detaining authority therefore, could and should have considered the question of possibility of opposing the bail application, if it is preferred by the petitioner before the Magisterial Court and ought to have considered the possibility of non-grant of bail. The possibility of getting the bail cancelled in the event the court did not accept the opposition to the grant of bail. If the detention order is seen alongwith the grounds of detention, it is amply clear that these material aspects have not been considered by the detaining authority. This is, therefore, a case of clear non-application of mind on this important and vital aspect and, therefore, the subjective satisfaction would stand vitiated. On this ground alone, the petition deserves to be allowed."

It therefore, becomes clear that the detaining authority

could have resisted the application for bail submitted by the petitioner before the court concerned. In case the bail was granted, the detaining authority or State of Gujarat could have made appropriate application for cancellation of bail to the concerned Court, as observed in the aforesaid judgment. The said aspect of lesser drastic remedy has not at all been considered by the detaining authority. A bare reading of the grounds of detention communicated to the detenu under section 9(1) of the PASA Act, it does not appear that the detaining authority has taken into consideration that the bail application, if preferred, could be opposed. The detaining authority therefore, could and should have considered the question of possibility of opposing bail application which has not been done in the present matter. The learned Judge has also observed that if the detention order was seen along with the grounds of detention, it is amply clear that the material aspects have not been considered by the detaining authority. Therefore, it is a clear case of non-application of mind on the material and vital aspect and subjective satisfaction would stand vitiated. The facts of the aforesaid case and the facts of the present case are identical and, therefore, in my opinion, the principles enunciated in the aforesaid matter will squarely apply to the facts of the case before this court also. In the present case also the detaining authority has not considered the material aspects of the case as referred to hereinabove. On the one hand, he has not considered that the application for bail could be opposed. On the other hand, there is no application of mind with respect to the cancellation of bail under section 437 of the Code. Naturally these are the two lesser drastic remedies which were required to be taken into account before passing the detention order. This has not been done. Therefore, as said above, the present order suffers from non-application of mind. Therefore, it has to be treated to be illegal.

In above view of the matter and for the reasons stated hereinabove, the present petition succeeds and the same is allowed. The impugned order of detention recorded by the Commissioner of Police, Rajkot dated 30.7.2000 is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith, if not required in any other case.

Rule is made absolute accordingly. D.S. permitted.

3.5.2001 [D P Buch, J.]
msp